UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor,

Plaintiff,

-against-

A.C.E. RESTAURANT GROUP, INC., A.C.E. RESTAURANT GROUP OF NEW YORK, LLC, BAYONNE RESTAURANT LLC d/b/a HOULIHAN'S, BRICK FOOD LLC d/b/a HOULIHAN'S, BRIDGEWATER RESTAURANT LLC d/b/a HOULIHAN'S, CHERRY HILL RESTAURANT LLC d/b/a HOULIHAN'S, EATONTOWN FOOD LLC d/b/a HOULIHAN'S, FARMINGDALE RESTAURANT LLC d/b/a HOULIHAN'S, FAIRFIELD RESTAURANT LLC d/b/a HOULIHAN'S, HEIGHTS RESTAURANT LLC d/b/a HOULIHAN'S, HOLMDEL FOOD LLC d/b/a HOULIHAN'S, LAWRENCEVILLE RESTAURANT LLC d/b/a HOULIHAN'S, NEW BRUNSWICK RESTAURANT LLC d/b/a HOULIHAN'S, PARAMUS RESTAURANT LLC d/b/a HOULIHAN'S, RAMSEY RESTAURANT LLC d/b/a HOULIHAN'S, SECAUCUS RESTAURANT LLC d/b/a HOULIHAN'S, WEEHAWKEN RESTAURANT LLC d/b/a, WESTBURY EQUITIES LLC d/b/a HOULIHAN'S, WOODBRIDGE RESTAURANT LLC d/b/a HOULIHAN'S, AND ARNOLD RUNESTAD, an individual,

Defendants.

Hon. Joseph H. Rodriguez
United States District Judge

Civil Action No. 15-cv-07149 (JHR-AMD)

ECF CASE

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A DISCOVERY ORDER PURSUANT TO FED. R. CIV. P. 16(b)
(Motion Day June 20, 2016)

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT 1

II. ARGUMENT 2

A. FRCP 16(b) Does Not Require The Court To Issue A Scheduling Order Where a Motion to Dismiss is Pending and the District of New Jersey Local Rules Specifically Allow for Deferral 2

B. Discovery Should Not Proceed Where a Motion to Dismiss is Pending 4

1) There is no undue prejudice to Plaintiff to start discovery after the Motion to Dismiss is decided. 5

2) By contrast, allowing discovery to go forward now would create hardship and inequity for Defendants. 8

3) Deferring discovery would simplify the issues and the trial of this matter. 9

4) Discovery has not yet started and no trial date has been set. 10

III. CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Actelion Pharm. Ltd. v. Apotex Inc., No. CIV. 12-5743 NLH/AMD, 2013 WL 5524078 (D.N.J. Sept. 6, 2013) ... 2, 5
Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys., 988 F.2d 1157 (Fed.Cir.1993) ... 8
Ahmad v. Daniyal Enterprises, LLC, No. CV 2:14-1142-SDW-SCM, 2015 WL 6872481 (D.N.J. Nov. 9, 2015) ... 5
Asahi Glass Co. v. Pentech Pharmaceuticals, Inc., 289 F. Supp. 2d 986 (N.D. Ill. 2003) ... 8
Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) ... 4, 8
Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897 (1983) ... 8
Chudasama v. Mazda Motor Corp., 123 F.3d 1353 (11th Cir.1997) ... 4, 10
Clinton v. Jones, 520 U.S. 681 (1997) ... 7
Costantino v. City of Atl. City, No. CIV. 13-6667 RBK/JS, 2015 WL 668161 (D.N.J. Feb. 17, 2015) ... 7
Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 125 S. Ct. 1627 (2005) ... 8
Haas v. Burlington Cty., No. CIV. 08-1102 JHR/JS, 2009 WL 4250037 (D.N.J. Nov. 24, 2009) 7
Kaylor v. Fields, 661 F.2d 1177 (8th Cir.1981) ... 11
Levey v. Brownstone Inv. Grp., LLC, 590 F. App'x 132 (3d Cir. 2014) ... 10
Leyva v. Certified Grocers of California, Ltd. 593 F.2d 857 (9th Cir. 1979) ... 6
Mann v. Brenner, 375 F. App'x 232 (3d Cir. 2010) ... 2, 4
Mitchell v. Duval County Sch. Bd., 107 F.3d 837 (11th Cir. 1997) ... 10
Morris v. Azzi, 866 F. Supp. 149 (D.N.J.1994) ... 8
Motson v. Franklin Covey Co., No. 03-1067, 2005 WL 3465664 (D.N.J. Dec.16, 2005) ... 4, 5
Neitzke v. Williams, 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) ... 4
Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729 (9th Cir.1987) ... 4
Solis v. Texas, 488 F. App'x 837 (5th Cir. 2012) ... 7
Victor v. Huber, No. 12-282, 2012 WL 2564841 (M.D.Pa. July 2, 2012) ... 5
Wyeth v. Abbott Labs. No. CIV.A. 09-4850 JAP, 2011 WL 380902 (D.N.J. Feb. 1, 2011) ... 6

Statutes

29 U.S.C. § 201 ... 5
29 U.S.C. § 216(c) ... 7

Rules

Fed. R. Civ. P. 1 ... 6
Fed. R. Civ. P. 12(b)(6) ... 4
Fed. R. Civ. P. 16(b) ... 2, 3

Other Authorities

5 Wright & Miller § 1216, at 233-234 ... 8

I. PRELIMINARY STATEMENT

Defendants' pending motion to dismiss challenges the woefully deficient factual showing of Plaintiff's pleading. Overreaching is overreaching, whether it is by a private plaintiff or a governmental agency as plaintiff. Here, Plaintiff overreached by filing a complaint that extrapolates from a handful of unrepresentative "incidents" to implausibly allege that 1,430 employees involving 19 different Defendant corporate entities at 17 geographically diverse locations were all subject to the same violations. Further highlighting the implausibility of Plaintiff's allegations, public records supporting Defendants' pending motion disclose that the New Jersey Department of Labor audited Defendants in 2013, 2014, and 2015 and found Defendants' wage and hour practices to be entirely lawful. Accordingly, Plaintiff's claims here are subject to dismissal by virtue of the doctrines of *res judicata* and collateral estoppel.

Defendants made these arguments in their initial motion to dismiss. (See Dkt. 7). Plaintiff then filed a First Amended Complaint ("FAC") that did not address the prior findings of no violation by the state, and has not otherwise cured the deficiencies of Plaintiff's failure to make a representative showing in the initial complaint. Further, Plaintiff filed this action as related to the prior filing of *Sargent v A.C.E. Restaurant Group, Inc. et al.*, No. 15 Civ. 4013 (JHR-AMD) where on April 27, 2016, Judge Rodriguez granted Defendants' motion to dismiss, significantly narrowing the Second Amended Complaint in that case. (See Dkt. 42) Here, Defendants' motion to dismiss the FAC is currently pending before Judge Rodriguez.

Plaintiff now asks this Court to disregard the pending dispositive motion and proceed with a Scheduling Conference, before the Court has defined the scope of the case. Plaintiff argues that Defendants have made a motion to stay discovery, which they have not, in order to place the burden of Plaintiff's application on Defendants. This should be rejected. Plaintiff's motion for a premature scheduling order should also be rejected. Plaintiff argues that a delay in discovery will harm the public interest or cause evidentiary problems when in reality Plaintiff conducted an exhaustive audit of Defendants' wage and hour practices over the course of a two year investigation prior to filing a complaint in September 2015. From May 2013 through May 2015 Defendants provided Plaintiff with unlimited access to all of their books and payroll records. Plaintiff was granted unlimited *ex parte* access to interview hourly, managerial and executive employees during the entire investigative period. Plaintiff has had years to gather evidence before filing this action. By contrast, going forward with further unfocused discovery before the pending motion is decided would be an undue economic and administrative hardship for Defendants.

Plaintiff cites to out of circuit decisions when it is clear that the 3rd Circuit, in *Mann v. Brenner*, 375 F. App'x 232, 239 (3d Cir. 2010), and indeed this Court, in *Actelion Pharm. Ltd. v. Apotex Inc.*, No. CIV. 12-5743 NLH/AMD, 2013 WL 5524078, at *3 (D.N.J. Sept. 6, 2013) have previously ruled that under these circumstances it is proper to defer discovery until a motion to dismiss is decided.

Accordingly, this Court should deny Plaintiff's motion and allow Judge Rodriguez to determine the scope of the allegations that survive, if any, Defendants' motion before holding a Scheduling Conference.

II. ARGUMENT

A. FRCP 16(b) Does Not Require The Court To Issue A Scheduling Order Where a Motion to Dismiss is Pending and the District of New Jersey Local Rules Specifically Allow for Deferral

Plaintiff argues that the Court must issue a scheduling order under FRCP 16(b). However, FRCP 16(b) allows the Court "good cause" discretion on this issue. FRCP 16(b).

Similarly, the District of New Jersey Local Rules, specifically allow for deferral of the scheduling conference under these circumstances. The Local Rules provide that:

> The initial conference shall be scheduled within 60 days of filing of an initial answer, **unless deferred by the Magistrate Judge due to the pendency of a dispositive or other motion.** Local Rule 16.1(a)(1) [emphasis added].

Thus, there is support for this Court to deny Plaintiff's application based on a plain reading of the Rules and existing case law. FRCP 16(b) allows the Court to defer a scheduling conference where it finds good cause for such a deferral. The Local Rules provide the Court with a clear roadmap that Defendants' dispositive motion is such good cause to defer. Moreover, as argued below, the 3rd Circuit in *Mann* and this Court in *Actelion* have already ruled that it is appropriate to hold an Initial Conference after a motion to dismiss is decided.

Plaintiff asks the Court to place a burden of proof on Defendants, the non-moving party, by asking the Court to treat his application to start pre-mature discovery as though Defendants had moved for a stay of an existing discovery order. This argument should be rejected. First, the Rules provide guidance when to enter a scheduling order. Second, the Court has not entered a scheduling order. The cases cited by Plaintiff are inapposite because they were applications to alter previously entered scheduling orders, negotiated and agreed by the parties, and so ordered by the court. Here, the higher standard to grant a stay is inapplicable because there is no stay being requested as no discovery order is in place.

Assuming, *arguendo*, that this Court does analyze Plaintiff's motion as one for a stay of discovery, the relevant factors would clearly favor Defendants, as argued below, and so this Court should deny Plaintiff's motion.

B. Discovery Should Not Proceed Where a Motion to Dismiss is Pending

The Third Circuit has found that it is appropriate to stay discovery pending a motion to dismiss. *Mann*, 375 F. App'x at 239 (affirming dismissal and finding the district court properly stayed discovery pending resolution of motions to dismiss). While the *Mann* court cites *Ashcroft v. Iqbal*, 556 U.S. 662, 686, 129 S. Ct. 1937, 1954, 173 L. Ed. 2d 868 (2009) in support of its finding that a stay of discovery was appropriate, Plaintiff attempts to turn the *Iqbal* standard on its head by arguing that the increase in motions to dismiss post-*Iqbal* has led to a delay in discovery. The *Mann* court specifically addressed *Iqbal* and found support for a stay of discovery within that case also citing *Neitzke v. Williams*, 490 U.S. 319, 326-27, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) (the purpose of Rule 12(b)(6) is to "streamline[ ] litigation by dispensing with needless discovery and factfinding"); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir.1997) ("A motion to dismiss based on failure to state a claim for relief should ... be resolved before discovery begins."); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir.1987) (the idea that discovery should be permitted before deciding a motion to dismiss "is unsupported and defies common sense [because t]he purpose of F. R. Civ. P. 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery") *Mann* at 239.

Similarly, Plaintiff attempts to turn this Court's decision in *Actelion* on its head by citing to the general proposition that the mere filing of a dispositive motion is not an automatic stay of discovery. However, the significant ruling in *Actelion* was that a discovery stay was proper pending the motion to dismiss. The Court in *Actelion* set out a 4 factor test in evaluating a stay:

> (1) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party[,]" *Cima Labs*, 2007 WL 1672229, at *8 (citing *Motson v. Franklin Covey Co.*, No. 03–1067, 2005 WL 3465664, at *1 (D.N.J. Dec.16,

2005)); (2) whether denial of the stay would create " 'a clear case of hardship or inequity' "for the moving party, *Hertz Corp. v. The Gator Corp.*, 250 F. Supp.2d 421, 424 (D.N.J.2003) (quoting *Gold*, 723 F.2d at 1075–76); (3) "whether a stay would simplify the issues and the trial of the case[,]" *Cima Labs*, 2007 WL 1672229, at *8 (citing *Motson*, 2005 WL 3465664, at *1); and (4) "whether discovery is complete and/or a trial date has been set."
Actelion Pharmaceuticals Ltd., 2013 WL 5524078, at *3.

Further, the *Actelion* court found that "if a dispositive motion is pending, courts further consider whether the pending dispositive motion "appear[s] to have substantial grounds or, stated another way, do[es] not appear to be without foundation in law[,]" citing *Victor v. Huber*, No. 12–282, 2012 WL 2564841, at *2 (M.D.Pa. July 2, 2012) (internal quotations and citations omitted), in assessing "whether a stay would simplify the issues and the trial of the case [.]" *Cima Labs*, 2007 WL 1672229, at *8 (citing *Motson*, 2005 WL 3465664, at *1)." Each of these factors favor Defendants' position that discovery should be deferred until Defendants' motion is decided.

1) There is no undue prejudice to Plaintiff to start discovery after the Motion to Dismiss is decided.

Plaintiff puts forth three reasons to show how a delay will result in prejudice. Pltf. Memo at 5-7. Each is unavailing. First, despite the two-year investigation, Plaintiff argues that now there is some "time-sensitive" nature to an FLSA claim and somehow attempts to link this to an employee's "basic well being." While it is difficult to follow this logic, it is significant to note that there is no "clock ticking" with respect to workers' "opt in" rights. The statute of limitations is not running on any employee's claim as this is a case brought by the Plaintiff under Section 16(c) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 201, et seq.) ("the Act" or "the FLSA"). All 1.430 workers named in Plaintiff's FAC are automatically included in this matter, no opt-in mechanism is needed. *Ahmad v. Daniyal Enterprises, LLC*, No. CV 2:14-1142-SDW-SCM, 2015 WL 6872481, at *3 (D.N.J. Nov. 9, 2015). Thus, there is no "time sensitive" issue in this matter regarding the preservation of valid claims as may appear in private FLSA "opt-in" cases. Moreover, the *Leyva v. Certified Grocers of California, Ltd.* 593 F.2d 857 (9th Cir. 1979) case cited by Plaintiff actually affirmed the stay of discovery. The *Leyva* court did not relate to a stay pending a dispositive motion but rather a stay pending other proceedings. The court merely referenced that the arbitration proceeding should proceed in a diligent and efficient manner as it related to FLSA claims. Here, determining whether any claims survive Defendants' motion will define the scope of the case. Conducting discovery on issues that may well be dismissed does not serve the purposes of Rule 1 of the FRCP for the just, speedy and inexpensive resolution of every matter.

Plaintiff next argues that "the vast majority of the Secretary's witnesses are **third parties**" and that a delay may lead to faded "memories" and "loss of evidence." Unlike private litigants Plaintiff has had virtually unfettered access to Defendants' payroll records, hourly employees, managers, and senior management for over two years, including the *ex parte* interview of the individual Defendant herein, while it was investigating Defendants' wage and hour practices. Plaintiff conducted interviews of hundreds of employees and were provided with over 18 boxes of requested payroll records and other documents. Despite Defendants' full cooperation with Plaintiff's investigation and massive document production, Plaintiff has still failed to allege factual showings of wide spread violation, as set forth in Defendants' pending motion. Plaintiff has no basis to argue that the relatively brief time it takes for the Court to decide the motion will in any way deny Plaintiff access to witnesses or documents it already has. Plaintiff's citation to *Wyeth v. Abbott Labs.* No. CIV.A. 09-4850 JAP, 2011 WL 380902, at *2 (D.N.J. Feb. 1, 2011) is inapposite as that case related to a stay request so that the U.S. Patent

Office could reconsider a patent application. The court found this may take 6.5 years and that such a delay was too long. Similarly, the *Clinton v. Jones*, 520 U.S. 681 (1997) stay was denied, in part, as the delay in waiting for the President to leave office years later was deemed too long. The *Costantino v. City of Atl. City*, No. CIV. 13-6667 RBK/JS, 2015 WL 668161, at *4 (D.N.J. Feb. 17, 2015) case dealt with a bankruptcy stay for an undetermined period of time. More instructive is this districts finding in *Haas v. Burlington Cty.*, No. CIV. 08-1102 JHR/JS, 2009 WL 4250037, at *3 (D.N.J. Nov. 24, 2009) where the court rejected the "faded memories" argument in granting a stay of discovery reasoning that defendant has a continuing duty to preserve evidence and that the stay was not expected to last a long time.

By contrast here there is no such claim of a lengthy delay. Here the Court has already granted a motion to dismiss in the related *Sargent* case and there is no reason to believe the Court will not decide the dispositive motion in this case in a timely manner.

Plaintiff's final argument for prejudice is an amorphous "public interest" in timely FLSA enforcement. Plaintiff's citations to civil rights cases and criminal proceedings are inapposite here. For example, the court in *Costantino* noted that there was a public interest to know whether Atlantic City and its police officers were violating its citizens' civil rights. There is no such equivalence here. The *Solis v. Texas*, 488 F. App'x 837 (5th Cir. 2012) case dealt with Sovereign Immunity and not a stay of proceedings. Further, the fact that the instant matter was filed under 29 U.S.C. § 216(c) without the need for individuals to opt-in satisfies the public interest in timely proceedings.

As Plaintiff has not shown undue prejudice, this Court should deny its motion.

2) By contrast, allowing discovery to go forward now would create hardship and inequity for Defendants.

Defendants should not be asked to bear the expense and time consuming burdens of discovery related to 17 different restaurant locations and a wide variety of workers on the basis of a few unrepresentative "examples" in what essentially is alleged to be a complex multi-issue class-action case. *See Morris v. Azzi*, 866 F. Supp. 149, 152 (D.N.J.1994) ("The purpose of the rule is to allow the court to eliminate actions that are fatally flawed in their legal premise and destined to fail, and thus spare the litigants the burdens of unnecessary pretrial and trial activity"); *See also Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys.*, 988 F.2d 1157, 1160 (Fed.Cir.1993), *reh'g en banc denied* (same); *In re NorVergence, Inc.*, 384 B.R. 315, 350 (Bankr. D.N.J. 2008) (same). In finding a complaint insufficient to withstand dismissal, the Supreme Court in *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 125 S. Ct. 1627 (2005) recognized that a plaintiff with "a largely groundless claim" could be allowed to "take up the time of a number of other people, with the right to do so representing an in terrorum increment of the settlement value." *Id*. at 347. A deficient pleading may not "unlock the doors of discovery." *Iqbal* at 678-679. Where a complaint does not raise a claim of entitlement to relief, "this basic deficiency should … be exposed at the point of minimum expenditure of time and money by the parties and the court." 5 *Wright & Miller* § 1216, at 233-234; *see also Asahi Glass Co. v. Pentech Pharmaceuticals, Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) ("[S]ome threshold of plausibility must be crossed at the outset before a. . . case should be permitted to go into its inevitably costly and protracted discovery phase"). A "district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459

U.S. 519, 528, n. 17, 103 S. Ct. 897 (1983). In finding this factor favors the party moving for dismissal, this Court found in *Actelion* that "the potential cost of discovery establishes a specific and substantiated risk of harm." As such, the same is true here and this factor heavily favors Defendants.

3) Deferring discovery would simplify the issues and the trial of this matter.

The pending motion to dismiss will clearly narrow and simplify issues, should any remain in the case. The pending motion argues, in part, that Plaintiff has failed to plead facts that are fairly representative of so many dissimilar workers at so many diverse locations. Put simply, Plaintiff pleaded a few examples at a few locations to allege that violations existed at locations where no factual basis whatsoever was shown in the FAC. If the Court rejects this pleading, as we believe it should and will, an untold number of defendant locations and occupations of workers will no longer be involved in this case. Discovery would thus be exponentially smaller and simpler. Moreover, allegations are subject to *res judicata* and thus dismissal of Plaintiff's entire claim is warranted. Defendants' Motion to Dismiss clearly has merit as it relies on weighty legal authority, including Plaintiff's own published interpretations of the FLSA.

As this Court found in *Actelion*, the standard for this Court to review the merits of a motion to dismiss is to determine whether the motion "does not appear to be without foundation in law." *Actelion* at *5. Defendants' motion easily meets this standard. Further, this Court noted that it should not look into the underlying merits of the motion because "requiring this Court to opine on the underlying merits of the [] dispositive motion, in addition to the District Court's consideration, would be unduly duplicative."

When Plaintiff filed this case, he designated it as a related case to the *Sargent* case. In *Sargent*, the Court recently granted a similar motion to dismiss. (Dkt. No. 42) Judge Rodriguez' disposition of that case may be telling for the current motion to dismiss.

4) Discovery has not started and no trial date has been set.

The case has just begun, a Motion to Dismiss is pending, no answer has been filed. There is no consideration that a delay will somehow delay a set trial date. As the *Actelion* court noted:

> the case remains in its initial stages and no trial date has been set. Moreover, Plaintiffs' complaint was filed on September 14, 2012 (see Complaint for Declaratory Judgment [Doc. No. 1]), with the present motion filed shortly thereafter on January 16, 2013. Such temporal proximity supports the issuance of a stay because no party has engaged in significant production or protracted motion practice. Therefore, the Court finds this factor likewise favors entry of a stay. *Actelion* at *6.

Since Plaintiff concedes that it is not looking for discovery to bolster its pleadings (Pltf. Mem. 10.), there is even less need for discovery to proceed here. The 3rd Circuit recently addressed this issue once again in *Levey v. Brownstone Inv. Grp.*, LLC, 590 F. App'x 132, 137 (3d Cir. 2014) and affirmed dismissal and the magistrate's decision to stay discovery pending a motion to dismiss. The *Levey* court found plaintiff was "not entitled to burden [defendant] with discovery…given the deficiencies of his complaint" and that allowing discovery "would be providing [plaintiff] the opportunity 'to conduct a fishing expedition in order to find a cause of action." Defendants' Motion to Dismiss presents legal questions and so discovery is both inappropriate and unnecessary. *Chudasama*, 123 F.3d at 1367 (finding a decision on a motion to dismiss should have come before discovery, reasoning that a motion to dismiss "always presents a purely legal question; there are no issues of fact because the allegations contained in the pleading are presumed to be true. *See Mitchell v. Duval County Sch. Bd.*, 107 F.3d 837, 838 n. 1 (11th Cir. 1997) (per curiam). Therefore, neither the parties nor the court have any need for discovery before the court rules on the Motion to Dismiss. *See Kaylor v. Fields*, 661 F.2d 1177, 1184 (8th Cir.1981) ("Discovery should follow the filing of a well-pleaded complaint. It is not a device to enable a plaintiff to make a case when his complaint has failed to state a claim"). It was incumbent upon Plaintiff to ascertain the facts of this case prior to filing the FAC, rather than hoping to find evidence in support of its contentions in discovery. Here, Plaintiff has not crossed the threshold of pleading plausible claims to allow discovery to proceed.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion should be denied in its entirety.

Dated: Jericho, New York
June 6, 2016

Respectfully submitted,
LIPMAN & PLESUR, LLP

By: /s/ Douglas Weiner
Douglas Weiner, Of Counsel
Robert D. Lipman (admitted *pro hac vice*)
David A. Robins (admitted *pro hac vice*)
500 North Broadway, Suite 105
Jericho, NY 11753
Telephone: (516) 931-0050
Facsimile: (516) 931-0030

Attorneys for Defendants